Midland National Life Insurance Company and Local 304A, United Food & Commercial Workers Union, AFL-CIO, Petitioner. Case 18-RC-11713

August 4, 1982

## DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pursuant to the provisions of a Stipulation for Certification Upon Consent Election executed by the parties and approved by the Regional Director for Region 18, on March 2, 1978, an election by secret ballot was conducted on April 28, 1978, among the employees in the appropriate unit. Upon the conclusion of the election, a tally of ballots was furnished to the parties in accordance with the Board's Rules and Regulations, Series 8, as amended. The tally of ballots shows that of approximately 203 eligible voters, 75 cast ballots for the Petitioner, 127 cast ballots against the Petitioner, 1 ballot was void, and 5 ballots were challenged, a number insufficient to affect the results.

The Petitioner filed objections to conduct affecting the results of the election, as well as a charge alleging certain unlawful conduct by the Employer. The Regional Director thereafter caused an investigation to be made into the issues thus raised. On July 18, 1978, a complaint was issued against the Employer alleging that since on or about March 27, 1978, the Employer had violated Section 8(a)(1) of the Act by engaging in various specified acts which restrained, coerced, and interfered with its employees in the exercise of their rights under the Act. On July 25, 1978, the Regional Director issued an order directing a hearing on the Petitioner's objections to the election, and consolidating the representation and unfair labor practice cases for hearing. A hearing was held before an administrative law judge who issued a Decision finding that the Employer had committed unfair labor practices as alleged, that the Employer had engaged in objectionable conduct affecting the results of the election, and that accordingly a second election should be held. On August 9, 1979, the Board affirmed the Administrative Law Judge's findings and conclusions, and adopted her recommended Order.<sup>2</sup> The United States Court of Appeals for

the Eighth Circuit enforced this decision on May 7, 1980.<sup>3</sup>

Pursuant to the Board's Order of August 9, 1979, the Regional Director held a second election on October 16, 1980. Upon the conclusion of the election, a tally of ballots was furnished to the parties in accordance with the Board's Rules and Regulations, Series 8, as amended. The tally of ballots shows that of approximately 239 eligible voters, 107 cast ballots for the Petitioner, 107 cast ballots against the Petitioner, 1 ballot was void, and 20 ballots were challenged, a number sufficient to affect the results.

On October 21, 1980, the Petitioner filed timely objections to conduct affecting the results of the election, and on November 13, 1980, the Regional Director issued an order directing a hearing on the issues raised by the challenged ballots and the objections. Pursuant to this order, a hearing was held before Hearing Officer Frank E. Kapsch, Jr., of the National Labor Relations Board. On January 26, 1981, the Hearing Officer issued his report and recommendations. In his report, the Hearing Officer found that the parties stipulated that the individuals casting the 20 challenged ballots were ineligible solely for the purposes of the October 16, 1980, election; he accordingly recommended that the stipulation be approved and that the challenges be sustained. The Hearing Officer also recommended that the Board direct a third election because the Employer had engaged in objectionable conduct alleged in the Petitioner's Objections 1 and 2.4 Thereafter, on February 23, 1981, the Employer timely filed exceptions to the Hearing Officer's report and brief in support thereof, contending that the Hearing Officer had erred in sustaining Petitioner's Objections 1 and 2.5 On March 2, 1981, the Petitioner filed a response to the Employer's exceptions.

The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the record, including the Hearing Officer's report and recommendations, the Employer's exceptions and

<sup>1</sup> The appropriate unit is:

All full-time and regular part-time employees employed by the Employer at its Sioux Falls facilities, including employees in the following departments: actuarial services, agency administration, agency development, administrative services, claims, credit insurance, data processing, planning and control, policyholders service, treasury, policy and field accounting, policy issues, underwriting, sales services and technicians employed in those departments; excluding confidential employees, guards and supervisors as defined by the National Labor Relations Act.

<sup>\* 244</sup> NLRB 3 (1979)

<sup>&</sup>lt;sup>3</sup> N.L.R.B. v. Midland National Life Insurance Company, 621 F.2d 901 (8th Cir. 1980).

<sup>&</sup>lt;sup>4</sup> In the absence of exceptions thereto, we adopt, pro forma, the Hearing Officer's recommendations that Objection 1, to the extent that it concerns Petitioner's Exh. 9, and Objections 3, 4, 5, 6, and 7 be overruled. Furthermore, inasmuch as the parties stipulated at the hearing that the individuals casting the 20 challenged ballots were ineligible solely for the purposes of the October 16 election, we also adopt, pro forma, the Hearing Officer's recommendation that the challenges to those 20 ballots be sustained.

<sup>&</sup>lt;sup>8</sup> After carefully considering the record and the Hearing Officer's report, we can find no merit in the Employer's contention that the Hearing Officer evidenced a bias toward the Employer or the Employer's counsel. Accordingly, we reject the Employer's allegations of bias.

brief, and the Petitioner's response, and, for the reasons discussed below, finds merit in the Employer's exceptions.<sup>6</sup>

I.

The facts are not complex. On the afternoon of October 15, 1980, the day before the election, the Employer distributed campaign literature to its employees with their paychecks. One of the distributions was a six-page document which included photographs and text depicting three local employers and their involvements with the Petitioner. The document also contained a reproduction of a portion of the Petitioner's 1979 financial report (hereinafter LMRDA report) submitted to the Department of Labor pursuant to the provisions of the Labor Management Reporting and Disclosure Act of 1959. The Petitioner learned of the document the next morning, 3-1/2 hours before the polls were to open.

The first subject of the document, Meilman Food, Inc., was portrayed in "recent" pictures as a deserted facility, and was described in accompanying text as follows: "They too employed between 200 and 300 employees. This Local 304A struck this plant—violence ensued. Now all of the workers are gone! What did the Local 304A do for them? Where is the 304A union job security?" Jack Smith, the Petitioner's business representative, testified that Local 304A, the Petitioner, had been the representative of Meilman's employees, but that neither the Petitioner nor Meilman's employees had been on strike when the plant closed. He added that the employees had been working for at least 1-1/2 years following the strike and prior to the closure of the facility.

The second and third employers pictured and discussed in the document were Luther Manor Nursing Home and Blue Cross/Blue Shield. The text accompanying the pictures of Luther Manor explained that:

[a]lmost a year ago this same union that tells you they will "make job security" (we believe you are the only ones who can do that) and will get you more pay, told the employees of LUTHER MANOR (again, here in Sioux Falls) . . . the union would get them a contract with job security and more money. Un-

fortunately Local 304A did not tell the Luther Manor employees what year or century they were talking about. Today the employees have no contract. Most of the union leaders left to work elsewhere. Their job security is the same (depends upon the individual as it always has). There has been no change or increase in wages or hours. The union has sent in three different sets of negotiators. Again, promises and performance are two different things. All wages, fringes, working conditions are remaining the same while negotiations continue.

The text accompanying the pictures of Blue Cross stated that "this same Local union won an election at Blue Cross/Blue Shield after promising less restrictive policies, better pay and more job security. Since the election a good percentage of its former employees are no longer working there. Ask them! The employees have been offered a wage increase—next year of 5% . . . ."

Smith testified that the Petitioner took over negotiations at Luther Manor and at Blue Cross on or about July 1, 1980, after the Petitioner had merged with Retail Clerks, Local 1665, and that Retail Clerks, Local 1665, not the Petitioner, had conducted the prior negotiations and won the election at Blue Cross.

Assessing the statements concerning these local employers, the Hearing Officer concluded that, in its description of Meilman Food, the Employer intended to instill in the minds of its employees the false impression that the Petitioner had conducted a strike at Meilman, that violence had ensued, and that, as a direct result of the strike, all of the employees at Meilman were terminated. Evaluating the statements about Luther Manor and Blue Cross, the Hearing Officer found that the Employer had misrepresented the labor organization involved, and had implied that the Petitioner was an ineffectual and inefficient bargaining representative who would cause employees to suffer.

The Employer's distribution also included a portion of the Petitioner's 1979 LMRDA report which listed information concerning the Petitioner's assets, liabilities, and cash receipts and disbursements for the reporting period. Three entries on the reproduced page were underlined: total receipts, reported at \$508,946; disbursements "On Behalf of Individual Members," reported at zero; and total disbursements, reported at \$492,701. Other entries on the reproduced page showed disbursements of \$93,185 to officers, and \$22,662 to employees. The accompanying text stated that \$141,000 of the Petitioner's funds went to "union officers and officials and those who worked for

<sup>&</sup>lt;sup>6</sup> The Hearing Officer recommended that Petitioner's Objection 2 be sustained inasmuch as there was evidence that supervisors or agents of the Employer distributed antiunion buttons, engaged in other coercive conduct, and interrogated employees about their union sympathies. We have carefully reviewed the record and can find no evidence to support the finding that the alleged supervisors or agents in fact had that status. Accordingly, we reject the Hearing Officer's recommendation and overrule Petitioner's Objection 2.

<sup>7 29</sup> U.S.C.A. § 401, et seq.

them," and that "NOTHING—according to the report they filed with the U.S. Government was spent 'on behalf of the individual members.' [sic]"

The Hearing Officer found that the report actually showed that the Petitioner disbursed only \$115,847 to its officers and employees, a difference of \$25,000, and that the Employer's statement attributed 19 percent more in income to the officials and employees than was actually received. He further found that, while the report showed that no sums had been spent "on behalf of the individual members," the instructions for the LMRDA report require that entry to reflect disbursements for "other than normal operating purposes," and that the Employer failed to include this fact in its distribution.

In accordance with his findings outlined above, the Hearing Officer concluded that the document distributed by the Employer contained numerous misrepresentations of fact of a substantial nature designed to portray the Petitioner as an organization staffed by highly paid officials and employees who were ineffectual as bargaining representatives, and that as a consequence employees would suffer with respect to job security and compensation. The Hearing Officer also determined that the document was distributed on the afternoon before the election, that the Petitioner did not become aware of it until approximately 10 a.m. election day, 2-1/2 hours before the preelection conference and 3-1/2 hours before the polls were to open, and that, owing to the nature of the misrepresentations, the Petitioner did not have sufficient time to respond effectively. Applying the standard found in General Knit of California, Inc., 8 and Hollywood Ceramics Company, Inc., 9 the Hearing Officer accordingly recommended that the objection be sustained and that a third election be directed.

We have decided to reject the Hearing Officer's recommendations and to certify the results of the election. We do so because, after painstaking evaluation and careful consideration, we have resolved to return to the sound rule announced in Shopping Kart Food Market, Inc., 10 and to overrule General Knit and Hollywood Ceramics. Before discussing the controlling factors which underlie our decision, we believe it would be instructive to review briefly the Board's past treatment of this troublesome area.

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During the years under the Wagner Act, the Board made no attempt to regulate campaign propaganda, and concerned itself solely with conduct which might tend to coerce employees in their election choice. As the Board stated in *Maywood Hosiery Mills, Inc.*, 64 NLRB 146, 150 (1945), "we cannot censor the information, misinformation, argument, gossip, and opinion which accompany all controversies of any importance and which, perceptively or otherwise, condition employees' desires and decisions; nor is it our function to do so." "[E]mployees," as the Board acknowledged even then, "undoubtedly recognize [campaign] propaganda for what it is, and discount it." *Corn Products Refining Company*, 58 NLRB 1441, 1442 (1944).

Following the enactment of the Taft-Hartley amendments, the Board continued to disregard issues concerning the truth or falsity of campaign propaganda. 

N. P. Nelson Iron Works, Inc., 78 NLRB 1270, 1271 (1948); Carrollton Furniture Manufacturing Company, 75 NLRB 710, 712 (1948). Again relying on the ability of employees to recognize and assess campaign propaganda for what it is, the Board entrusted these matters to the "good sense" of the voters. Id. In an apparent effort to remove itself further from controversies of this nature, the Board also imposed a duty upon the parties to correct "inaccurate or untruthful statements by any of them." Id.

Even as it was refusing to consider the truth or falsity of campaign propaganda, the Board announced its "laboratory conditions" standard. General Shoe Corporation, 77 NLRB 124 (1948). Assessing certain conduct it characterized as "calculated to prevent a free and untrammeled choice by the employees," the Board noted that "[a]n election can serve its true purpose only if the surrounding circumstances enable employees to register [such a] choice for or against a bargaining representative." Id. at 126. Recounting that it had in the past set aside elections where the "record reveal[ed] conduct so glaring that it is almost certain to have impaired employees' freedom of choice," the Board found that it "[could] not police the details surrounding every election," and reasserted its belief that "in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth." Id. The majority also stated that, contrary to the "apparent" view of the dissenters in the case, the criteria applied to representation proceedings should not be the same as that applied to unfair labor practice proceedings. "In election proceedings, it is the

<sup>\* 239</sup> NLRB 619 (1978).

<sup>9 140</sup> NLRB 221 (1962).

<sup>10 228</sup> NLRB 1311 (1977).

<sup>&</sup>lt;sup>11</sup> In considering the Taft-Hartley amendments to the Act, Congress expressed no disapproval of the Board's refusal to regulate such campaign propaganda, and in fact sought to reduce even further the Board's ability to restrict speech by enacting Sec. 8(c). See N.L.R.B. v. The Golub Corporation, et al., 388 F.20 921 (2d Cir. 1967).

Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." Id. at 127. However, as was subsequently explained in The Liberal Market, Inc., 108 NLRB 1481, 1482 (1954), the Board had a realistic recognition that elections did "not occur in a laboratory where controlled or artificial conditions may be established," and that, accordingly, the Board's goal was "to establish ideal conditions insofar as possible," and to assess "the actual facts in the light of realistic standards of human conduct." Id.

Exhibiting the understanding and realism espoused in Liberal Market, the Board recognized a limited exception to its general rule barring an examination of the effect of the truth or falsity of campaign propaganda upon the election results. Thus, where it appeared that employees were deceived as to the source of campaign propaganda by trickery or fraud, and that they could therefore neither recognize nor evaluate propaganda for what it was, the Board set aside the election. United Aircraft Corporation, 103 NLRB 102 (1953). See also The Timken-Detroit Axle Company, 98 NLRB 790 (1952). In those situations, the Board found that election standards had been "lowered ... to a level which impaired the free and informed atmosphere requisite to an untrammeled expression of choice by the employees." United Aircraft Corporation, 103 NLRB at 105.

It was not until 20 years after the Board began establishing standards for elections that it deviated from its practice of refusing to consider the truth or falsity of campaign propaganda. In The Gummed Products Company, 112 NLRB 1092 (1955), the Board set aside an election where the union deliberately misrepresented wage rates it had negotiated with another employer. Recognizing that it "normally [would] not censor or police preelection propaganda by parties to elections, absent threats or acts of violence," the Board noted that "some limits" had been imposed. Id. at 1093. "Exaggerations, inaccuracies, partial truths, namecalling, and falsehoods, while not condoned, may be excused as legitimate propaganda, provided they are not so misleading as to prevent the exercise of free choice by employees in the election of their bargaining representative. The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election." Id. at 1093-94.

The Board refined this standard 7 years later in Hollywood Ceramics Company, Inc., 140 NLRB 221

(1962). Overruling prior cases which indicated that intent to mislead was an element of the standard, the Board stated that "an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." *Id.* at 224.

In 1977, after 15 years of experience under this rule, a majority of the Board decided in Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977), to overrule Hollywood Ceramics, and to return to Board practice which had preceded Gummed Products. Thus, the Board stated that it would "no longer probe into the truth or falsity of the parties' campaign statements," but would instead recognize and rely on employees "as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." Id. at 1311, 1313. Consistent with this view, the majority also held that the Board would intervene "in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." Id. at 1313.

A scant 20 months later, the Board reversed itself, overruled Shopping Kart, and reinstated the Hollywood Ceramics standard. General Knit of California, Inc., 239 NLRB 619 (1978). Finding that the rule propounded in Shopping Kart was "inconsistent with [the Board's] responsibility to insure fair elections," the Board stated that "there are certain circumstances where a particular misrepresentation . . . may materially affect an election," and that such an election should be set aside "in order to maintain the integrity of Board elections and thereby protect employee free choice." Id. at 620.

Many lessons and conclusions can be drawn from this summary of the Board's past practice regarding the role of misrepresentations in Board elections and, no doubt, many will be. However, one lesson which cannot be mistaken is that reasonable, informed individuals can differ, and indeed have differed, in their assessment of the effect of misrepresentations on voters and in their views of the Board's proper role in policing such misrepresentations. No one can or does dispute the ultimate purpose of this controversy, that is the necessity of Board procedures which insure the fair and free choice of a bargaining representative. The sole question facing us is how that "fair and free choice" is best assured.

Ш.

We begin with the recognition that Congress has entrusted a wide degree of discretion to the Board to establish the procedures necessary to insure the fair and free choice of bargaining representatives by employees. N.L.R.B. v. A. J. Tower Co., 329 U.S. 324, 330 (1946). In carrying out this task, "the Board must act so as to give effect to the principle of majority rule set forth in § 9(a)" of the Act. Id. at 331.

Although the Board's exercise of discretion must be consistent with the principle of majority rule, the Supreme Court has held that the Board is not precluded from making "practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud." Id. In making these rules, the Board must weigh and accommodate not only the principle of majority rule, but several other conflicting factors, such as preserving the secrecy of the ballot, insuring the certainty and finality of election results, and minimizing unwarranted and dilatory claims by those opposed to the election results. Id.

Accordingly, a Board rule governing a representation proceeding need not be an "absolute guarantee" that the election will, without exception, reflect the choice of a majority of the voting employees. Rather, the rule simply must be "consistent with" and constitute a "justifiable and reasonable adjustment of the democratic process." *Id.* at 332, 333.<sup>12</sup>

For numerous reasons, we find that the rule we announce today constitutes just such a "justifiable and reasonable adjustment" of our democratic electoral processes. By returning to the sound principles espoused in *Shopping Kart*, not only do we alleviate the many difficulties attending the *Hollywood Ceramics* rule, but we also insure the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results.

As was discussed earlier, an election would be set aside under Hollywood Ceramics

... only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party... from making an effective reply, so that the misrepresentation, whether deliberate

or not, may reasonably be expected to have a significant impact on the election. 13

As an initial matter, it is apparent that reasonable, informed individuals can differ on the multitude of subjective issues encompassed in this rule. When does a particular statement involve a "substantial" departure from the "truth"? Under what conditions has there been time for an "effective reply"? May the misrepresentation "reasonably be expected" to have a "significant impact" upon the election? As Professor Derek C. Bok concluded in his classic work on the Board's election procedures, restrictions on the content of campaign propaganda requiring truthful and accurate statements "resist every effort at a clear formulation and tend inexorably to give rise to vague and inconsistent rulings which baffle the parties and provoke litigation."14

The Board's experience under the Hollywood Ceramics rule bears this out. As was found in Shopping Kart, although the adoption of the Hollywood Ceramics rule "was premised on assuring employee free choice its administration has in fact tended to impede the attainment of that goal. The ill effects of the rule include extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of election results." <sup>15</sup>

In sharp contrast to the Hollywood Ceramics standard, Shopping Kart "draws a clear line between what is and what is not objectionable."16 Thus, "elections will be set aside 'not on the basis of the substance of the representation, but the deceptive manner in which it was made.' . . . As long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party, the Board would leave the task of evaluating its contents solely to the employees."17 Where, due to forgery, no voter could recognize the propaganda "for what it is," Board intervention is warranted. Further, unlike Hollywood Ceramics, the rule in Shopping Kart lends itself to definite results which are both predictable and speedy. The incentive for protracted litigation is greatly reduced, as is the possibility of disagreement between the Board and

<sup>16</sup> General Knit of California, Inc., 239 NLRB 619, 629 (1978) (Member Penello dissenting).

<sup>12</sup> Thus, in A. J. Tower, the Supreme Court upheld the validity of the Board's rule prohibiting postelection challenges and stated that the rule was valid even if "it is subsequently ascertainable that some of the votes cast were in fact ineligible and that the result of the election might have been different had the truth previously been known." Id. at 333. As the Court found, the rule did not "pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. It is simply a justifiable and reasonable adjustment of the democratic process." Id.

<sup>18 140</sup> NLRB at 224.

<sup>&</sup>lt;sup>14</sup> "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 Harv. L. Rev. 38, 85 (1964).

<sup>15 228</sup> NLRB at 1312. Our dissenting colleagues choose to ignore all of the bases for our determination to overrule General Knit except that of administrative convenience. We reject the characterization that our only purpose is to cut down the level of litigation of election objections, though we agree that is one worthy goal served by our decision today.

<sup>17 11</sup> 

the courts. Because objections alleging false or inaccurate statements can be summarily rejected at the first stage of Board proceedings, the opportunity for delay is almost nonexistent. 18 Finally, the rule in Shopping Kart "furthers the goal of consistent and equitable adjudications" by applying uniformly to the objections of both unions and employers. 19

In addition to finding the Hollywood Ceramics rule to be unwieldy and counterproductive, we also consider it to have an unrealistic view of the ability of voters to assess misleading campaign propaganda. As is clear from an examination of our treatment of misrepresentations under the Wagner Act, the Board had long viewed employees as aware that parties to a campaign are seeking to achieve certain results and to promote their own goals. Employees, knowing these interests, could not help but greet the various claims made during a campaign with natural skepticism. The "protectionism" propounded by the Hollywood Ceramics rule is simply not warranted. On the contrary, as we found in Shopping Kart, "we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."20

This fact is apparently recognized to a certain extent even under Hollywood Ceramics. Thus, although the Board determined that a substantial misrepresentation had been made, the election would not be set aside if it also appeared that there had been ample time to respond. This result would obtain no matter how egregious the error or falsity, and regardless of whether in fact a response had been made.21

We appreciate that today's decision is likely to cause concern, just as did General Knit's quick retreat from Shopping Kart in 1978.<sup>22</sup> Accordingly,

we do not take this step lightly. We take it because of our emphatic belief that the rule in Shopping Kart is the most appropriate accommodation of all the interests here involved, and should be given a fair chance to succeed. Unlike its predecessor, it is a clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results. It removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections, and promotes uniformity in national labor law by minimizing the basis for disagreement between the Board and the courts of appeals. Weighing the benefits flowing from reinstatement of the Shopping Kart rule against the possibility that some voters may be misled by erroneous campaign propaganda, a result that even Hollywood Ceramics permits, we find that the balance unquestionably falls in favor of implementing the standard set forth in Shopping Kart. 23

In reaching this decision, we note that "[a]dministrative flexibility is . . . one of the principal reasons for the establishment of the regulatory agencies [because it] permits valuable experimentation and allows administrative policies to reflect changing policy views." Boyd Leedom, et al. v. International Brotherhood of Electrical Workers, Local Union No. 108, AFL-CIO, 278 F.2d 237, 243 (D.C. Cir. 1960). As is obvious from today's decision, the policy views of the Board have changed. We cannot permit earlier decisions to endure forever if, in our view, their effects are deleterious and hinder the goals of the Act. The nature of administrative decisionmaking relies heavily upon the benefits of the cumulative experience of the decisionmakers. Such experience, in the words of the Supreme Court, "begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." N.L.R.B. v. J. Weingarten, Intc., 420 U.S. 251, 265-266 (1975).

Cumulative experience need not produce the same understanding and insight. Reasonable minds can and indeed have differed over the most appropriate resolution of this issue. That no one can dispute. However, we again express our emphatic

<sup>18</sup> The figures cited by our dissenting colleagues purporting to compare the "number of elections in which allegations of misleading statements were ruled upon" before and after Shopping Kart hardly establish that the policy change we enunciate today will not have the desired effects. That parties continued to file misrepresentation objections in 1978 simply demonstrated their acknowledgment of the reality that Shopping Kart could be overturned by a shift of one Board Member. In fact, that is what occurred when former Member Truesdale replaced former Member Walther on the Board. In any event, had our dissenting colleagues been more amenable to giving Shopping Kart a reasonable chance to take life, perhaps their point might have some merit.

<sup>19</sup> See, e.g., Thomas E. Gates & Sons, Inc., 229 NLRB 705 (1977), and Cormier Hosiery Mills, Inc. and Central New Hampshire Dye, Inc., 230 NLRB 1052 (1977)

<sup>228</sup> NLRB at 1313.

<sup>&</sup>lt;sup>21</sup> See, e.g., Illinois Central Community Hospital, 224 NLRB 632, 638 (1976). Despite our dissenting colleagues' professed concerns about the need to eliminate "lies, trickery, and fraud" from election propaganda, they focus only on misrepresentations occurring during the waning hours of campaigns that usually have been waged for several weeks.

22 See, e.g., N.L.R.B. v. Mosey Manufacturing Co.. Inc., 595 F.2d 375

<sup>(7</sup>th Cir. 1979).

<sup>&</sup>lt;sup>23</sup> Our dissenting colleagues fundamentally misconstrue former Chairman Murphy's opinions in Shopping Kart and General Knit. A correct reading of those opinions clearly shows that her disagreement with the other members of the Shopping Kart was a matter of degree, not kind. Our decision today, therefore, in no way constitutes the radical departure that the dissenters would like the public to believe.

belief that on balance the rule in Shopping Kart best accommodates and serves the interests of all.

In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements.24 We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is.25 Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in Shopping Kart, we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

Accordingly, inasmuch as the Petitioner's objection alleges nothing more than misrepresentations, it is hereby overruled.<sup>26</sup> Because the tally of ballots shows that the Petitioner failed to receive a majority of the valid ballots cast, we shall certify the results.

## CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Local 304A, United Food & Commercial Workers Union, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

## MEMBERS FANNING and JENKINS, dissenting:

For the second time in five years, a bare majority of the Board has abandoned the flexible and balanced Hollywood Ceramics standard for determining when election campaign misrepresentations have overstepped the bounds of tolerability and substituted an ultra-permissive standard that places a premium on the well-timed use of deception, trickery, and fraud.<sup>27</sup> In reestablishing the Shopping Kart rule, the present majority adds nothing to the debate that has accompanied the seesawing of Board doctrine in this area. Instead, the majority reiterates the familiar theme of the "unrealistic view of the ability of voters to assess misleading campaign propaganda" (which it attributes to Hollywood Ceramics) and the promise of elimination of delays caused by the processing of misrepresentation objections.

The considerations that went into Hollywood Ceramics, as the brief history set forth by the instant majority shows, represented the accumulated wisdom and experience of several generations of Board Members, from the General Shoe case in the 1940's, through Gummed Products in 1955 and Hollywood Ceramics in 1962.<sup>28</sup> And the stated policies behind Hollywood Ceramics belie the majority's claim that it is based on an over-protectionist, condescending view of employees:

The basic policy underlying this rule, as well as the other rules in this election field, is to

<sup>&</sup>lt;sup>24</sup> In accordance with our usual practice, we shall apply our new policy not only "to the case in which the issue arises," but also "to all pending cases in whatever stage." Deluxe Metal Furniture Company, 121 NLRB 995, 1006-07 (1958). See, generally, former Member Penello's dissenting opinion in Blackman-Uhler Chemical Division—Synalloy Corporation, 239 NLRB 637, 638 (1978), applying the balancing test set forth by the Supreme Court in Securities & Exchange Commission v. Chenery Corporation, 332 U.S. 194, 203 (1947). As former Member Penello pointed out, applying the Shopping Kart standard retroactively imposes no substantial hardship on the objecting party. On the other hand, failure to do so would be contrary to the "statutory design." Chenery, supra. For, as discussed above, we believe that, on balance, the Hollywood Ceramics rule operates more to frustrate than to further the fundamental statutory purpose of assuring employee free choice.

<sup>&</sup>lt;sup>25</sup> United Aircraft Corporation, Pratt & Whitney Aircraft Division, 103 NLRB 102 (1953). See our discussion of this case in part II, supra.

Of course, as stated in Shopping Kart, we will also set elections aside when an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election. Allied Electric Products, Inc., 109 NLRB 1270 (1954).

<sup>26</sup> With respect to the LMRDA report, our dissenting colleagues' attempted analogy to the rule set forth in Formco, Inc., 233 NLRB 61 (1977), misses the mark by a wide margin. Formco clearly is inapposite, since here there is no Board document involved. In any event, there is no basis for describing—as the dissenters do—the Employer's presentation of the Form LM-2 excerpt as "an elaborately conceived fraud." The portion of the form distributed by the Employer appeared exactly as submitted by the Petitioner. We categorically reject the dissenters' suggestion that any misrepresentation of any document constitutes a fraud. Their novel position in this regard finds no support in the law, and they make no attempt to muster such support.

<sup>27</sup> Arguably, it is the present majority that for the first time establishes such a permissive standard. For then-Chairman Murphy, concurring in Shopping Kart, supra, 228 NLRB at 1314, agreed with the "basic princiset forth in Hollywood Ceramics, but worried that its "ruling has been expanded and misapplied as to have extended far from the original intent of the Board." Then-Chairman Murphy did not abandon analysis of the substance of the misrepresentation, as the present majority does. Rather, she sought to preserve some flexibility by taking the position that an election should be set aside "where a party makes an egregious mistake of fact." Id. at 1314. Moreover, she rejected the suggestion by her colleagues of the Shopping Kart majority that her concept of "egregious mistake of fact" was a very narrow one. Id. at 1314 fn. 24 and 1315 fn. 31. And, dissenting in General Knit of California. supra, then-Member Murphy, applying her "egregious mistake of fact" standard, characterized the issue presented in that case as "whether an accurate statement which is slightly ambiguous" could be the basis for setting aside the election. 239 NLRB at 633. Thus, her departure from Hollywood Ceramics would appear to have been more rhetorically than empirically radical.

<sup>&</sup>lt;sup>28</sup> However, we decidedly reject the majority's contention that, prior to Gummed Products, the Board had a rigid rule similar to the majority's present position. To the contrary, In United Aircraft Corporation, 103 NLRB 102, 104 (1953), the Board, summarizing earlier decisions, recognized a limit to the condonation of propaganda where it is "so misleading' as to prevent the exercise of a free choice by employees in the selection of their bargaining representative"; that policing would be withheld only if the propaganda remains within "bounds"; and that "the question to be decided is 'one of degree.' In sun, the ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election."

assure the employees full and complete freedom of choice in selecting a bargaining representative. The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of the employees. One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act. . . .

The Board has limited its intervention . . . because an election by secret ballot, conducted under Goverment auspices, should not be lightly set aside, and because we realize that additional elections upset the plant routine and prevent stable labor-management relations. We are also aware that absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees. Election campaigns are often hotly contested and feelings frequently run high. At such times a party may, in its zeal, overstate its own virtues and the vices of the other without essentially impairing "laboratory conditions." Accordingly, in reaching its decision in cases where objections to elections have been filed alleging that one party misrepresented certain facts, the Board must balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering.29

What the majority does now is to give up, in the interest of possibly reducing litigation, a speculative thing at best, any attempt to balance the rights of the employees and the campaigners. However, their goal, which, as the Board noted in General Knit, must never take precedence over preservation of the integrity of the electoral process, seems to have eluded the Board's prior attempt under Shopping Kart. For, according to an internal audit conducted for the General Counsel, the number of elections in which allegations of misleading statements were ruled upon increased from 327 in 1976,

the year before Shopping Kart was decided, to 357 in 1978, the first full year after Shopping Kart was in effect, this despite a decrease (from 8,899 to 8,464) in the total number of elections conducted in those respective years.<sup>31</sup>

In return for the illusory benefits of speed and a speculative lightening of its workload, the majority today errs in relinquishing the Board's obligation to put some limits on fraud and deceit as campaign tools. It is apparent that the system contemplated by Section 9 of the Act for representation elections has survived reasonably well during the decades in which the Board has taken a role in insuring the integrity of its elections. Indeed, the majority does not suggest deregulating the election process other than with respect to misrepresentations. In this connection, we are especially puzzled by the distinction the majority draws between forgery, which it will regulate, and other kinds of fraud, which it will not. The majority states that forgeries "render the voters unable to recognize the propaganda for what it is." Yet it is precisely the Board's traditional perception that there are some misrepresentations which employees can recognize "for what they are" and others which, in the Board's considered judgment, they cannot, that has made the Hollywood Ceramics doctrine so effective. In place of this approach, under which judgments take into account the facts of each case, the majority creates an irrebuttable presumption that employees can recognize all misrepresentations, however opaque and deceptive, except forgeries. Employees' free choice in elections, the only reason we run elections, must necessarily be inhibited, distorted, and frustrated by this new rule. To the majority, this is less important than the freedom to engage in lies, trickery, and fraud. Under the new rule, important election issues will be ignored in favor of irresponsible charges and deceit. Under Hollywood Ceramics, the Board did not attempt to sanitize elections completely but only to keep the campaign propaganda within reasonable bounds. Those bounds have now disappeared. Why?

Albeit today's American employees may be better educated, in the formal sense, than those of previous generations, and may be in certain respects more sophisticated, we do not honor them by abandoning them utterly to the mercies of unscrupulous campaigners, including the expert cadre of professional opinion molders who devise campaigns for many of our representation elections. In political campaigns, which are conducted over a

<sup>29 140</sup> NLRB at 223-224.

ao We find incomprehensible the majority's additional suggestion that the Shopping Kart rule (presumably as compared with the Hollywood Ceramics rule) "furthers the goal of consistent and equitable adjudications' by applying uniformly to the objections of both unions and employers." To our knowledge, no rule ever contemplated by the Board has treated misrepresentations by unions and employers differently.

<sup>31</sup> The number of misrepresentation cases was even higher in 1977, the year in which Shopping Kart was decided. However, the total number of elections held in 1977 was substantially higher than in either 1976 or 1978.

much longer period of time and are subject to extensive media scrutiny, the voters have ready access to independent sources of information concerning the issues. In representation campaigns, they do not. Thus, it has been observed that: "Promises are often written on the wind, but statements of fact are the stuff upon which men and women make serious value judgments. . . . and rank and file employees must largely depend on the company and the union to provide the data ... "32 As we said in our dissent in Shopping Kart, the very high level of participation in Board elections as compared with political elections speaks well for the Board's role in insuring a measure of responsibility in campaigning.33 On the other hand, absent some external restraint, the campaigners will have little incentive to refrain from any last-minute deceptions that might work to their short-term advantage.

In sum, we are able to agree with the majority on very little. But one point of agreement is the majority's statement that, "The sole question facing us here is how [the fair and free choice of a bargaining representative] is best assured." For the reasons set forth above, and also for the reasons set forth in *General Knit* and our dissent in *Shopping Kart*, we find it impossible to answer that question by abandoning one of the most effective means the Board has yet devised for assuring that desired result.

Turning to the facts of the instant case, the Employer misrepresented to the employees that a strike called by the Union led directly to the closing of a large local employer and that the Union had bargained extensively with two other local employers without success. These were substantial misrepresentations concerning the central issue in the choice of a bargaining representative—its effectiveness. But the Employer did not limit itself to simple misrepresentations. It stepped beyond that and engaged in an elaborately conceived fraud

when it presented and commented upon an excerpt from the Form LM-2 financial report the Union was required to file with the U.S. Department of Labor. Line 71 of the form, showing union disbursements "on behalf of individual members," appears to show that the Union made no such disbursements during the reporting year. The Employer both underlined that item and emphasized it in a separate notation. The Employer contrasted this negative disbursement figure with a figure which overstated by 19 percent the moneys paid to union officers and "those that worked for them." This contrast was designed, of course, to show that the hard-earned money collected from the Union's members benefited only union officials. What the excerpt and the Employer's notations concealed, however, was that the Labor Department's instructions for completing line 71 specifically exclude from disbursements "on behalf of individual members," all normal operating expenses. Thus, while a reader in possession of the instructions might realize that the Union's operating expenses, including salaries for the Union's staff, are incurred with the objective of benefiting all the members, the Employer carefully disguised this fact, egregiously distorted what the Union does with its members' money, and ingeniously made the Union itself appear to be the source of this misinformation. In addition, how many employees are going to read and understand this complicated form?

The Employer's fraudulent misstatement of the contents of this Government document is analogous to the mischaracterization of this Board's documents, and is at least equally objectionable. See Formco, Inc., 233 NLRB 61 (1977). Here, in sum, we have a fraudulent misrepresentation of a most serious and extreme nature, forming part of a series of material misrepresentations. Such conduct can hardly have failed to affect the election, especially since, with a tally of 107 to 107, the change of a single vote may have changed the outcome.

The majority through this decision is giving our election processes, possibly the most important part of installing a viable collective-bargaining relationship, over to the possible excesses of the participants and eliminating the Board from its statutory oversight responsibilities. Why? Accordingly, we must dissent.

<sup>&</sup>lt;sup>32</sup> J. I. Case v. N.L.R.B., 555 F.2d 202, 205 (8th Cir. 1977). As the cited case illustrates, the courts, although they have not hesitated to disagree with the Board's application of the *Hollywood Ceramics* standard to particular facts, have accepted its principles readily.

<sup>33</sup> Perhaps it is not practicable to regulate political campaign propaganda as the Board traditionally has policed representation campaigns, because elected Government positions must be filled within a very brief period after the election. As noted above, however, our system of majority collective-bargaining representation has not been endangered by Hollywood Ceramics.